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Ms. Marelene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, D.C. 20554

RE: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51

Dear Ms. Dortch:

Today, Will Johnson and I met with Commissioner McDowell and his Legal Advisor Christina Pauze' regarding the above proceeding. We discussed the attached and the positions reported in our September 18 ex parte.

Please let me know if you require any additional information.

Sincerely,

Dee May

Attachment
cc: C. Pauze'
R. Harold

Given the Unique History and Circumstances, the Commission Should Ensure that Exclusive Access Contracts Do Not Frustrate Video Competition and Broadband Goals.

- Given the unique history and circumstances of the video marketplace, exclusive access agreements, much like exclusive franchises, foreclose competition for consumers who live in affected properties and undermine new entry into the video marketplace.

- To address these concerns in a minimally invasive manner, the Commission should prohibit video providers from entering new, or enforcing existing, exclusive access agreements for any MDU or other private real estate developments for a limited period of time. The rule should then sunset in 5 years unless the Commission affirmatively finds that its extension is warranted by then-existing market conditions. This proposed rule would be narrowly-tailored to address the problem presented:

    - First, the rule would be limited to exclusive *access* agreements – those agreements that completely deny competitors the opportunity to compete for customers – and would not affect other types of arrangements, such as exclusive marketing agreements or bulk sales agreements.

    - Second, the rule would be time-limited, permitting competition to develop but automatically sunsetting absent a finding by the Commission that its extension is warranted.

    - Third, the proposed rule would only address the actions of video providers, and would not regulate property owners in any way.

    - Finally, such a rule would not address terms in existing agreements between video providers and MDU owners other than exclusive access provisions.

The Commission Has Authority to Adopt this Narrowly-Tailored Proposal.

- The Commission has authority to adopt the narrowly-tailored rule described above under Section 628 of the 1992 Cable Act. 47 U.S.C. § 548(b).

    - Section 628 prohibits cable operators and others from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to *hinder significantly or to prevent* any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming *to subscribers or consumers*." 47 U.S.C. § 548(b) (emphasis added).

    - In the current marketplace – with minimal wireline video competition and a history of exclusive and de facto exclusive franchises – exclusive access agreements have the effect of preventing competitive providers "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers," and deny those consumers a competitive choice. Moreover, given their impact on broadband deployment, exclusive access agreements may also frustrate the "continuing development of communication technologies" that was

also an objection of Section 628. The Commission should conclude, given current market conditions, that exclusive agreements constitute "unfair methods of competition or unfair or deceptive acts or practices."

- Adopting the proposed, narrowly-tailored rule also would be consistent with the Commission's mandate under Section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . regulating methods that remove barriers to infrastructure investment." *See* 47 U.S.C. § 157 note (a).

The Proposed Rule Should Apply to Existing and New Exclusive Access Contracts.

- Given the unique circumstances here, the Commission should exclusive access agreements, whether they are embodied in existing or in new contracts.

    - Nothing in Section 628 limits the scope of the Commission's authority to new – as opposed to preexisting – exclusive access contracts. Instead, Section 628 proscribes *all* "unfair methods of competition or unfair or deceptive acts or practices" that hinder the ability of programming distributors to provide programming to subscribers or customers. 47 U.S.C. § 548(b).

    - This provision applies squarely here, and applies to new and existing contracts alike. As the Commission previously concluded when it first adopted rules enforcing Section 628, "Congress intended that rules promulgated to implement Section 628 should be applied prospectively to *existing contracts*." *See* Memorandum Opinion & Order on Reconsideration of the First Report & Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 1902, 1939 (1994); *see also* First Report & Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 3359, 3365 (1993) (emphasis added) ("[T]he rules we adopt today will apply prospectively to existing contracts and to contracts executed after the effective date of the rules.").

    - Indeed, Congress itself recognized that its prohibition could affect existing contracts. It was for that reason that Section 628(h) expressly exempted certain contracts – not including exclusive access contracts – from the rules to be adopted under Section 628. *See* 47 U.S.C. § 548(h) (listing specific "Exemptions for Prior Contracts").

The Proposed Rule Presents No Constitutional Problems.

- The Contract Clause of the U.S. Constitution does not limit the Commission's authority to declare existing exclusive access agreements unenforceable, as that clause "by its terms applies only to state, not federal, enactments." *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1507 (D.C. Cir. 1984); *see also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 640-41

(1993) ("[F]ederal economic legislation . . . is not subject to constraints coextensive with those imposed upon the States by the Contract Clause.").

- A party challenging a federal action that arguably impairs a contract must rely on the Due Process Clause of the Fifth Amendment, which is satisfied so long as the challenged action is not "arbitrary and irrational." *See Pension Benefit Guar Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984) (citation and internal quotation marks omitted). Here, a decision by the Commission to proscribe the enforcement of existing as well as new contracts is consistent with the record and not "arbitrary and irrational."

- There is likewise no merit to the suggestion that a rule preventing video service providers from enforcing existing exclusive access agreements would constitute an unconstitutional taking.

    - The Fourth Circuit has held that a state regulation prohibiting payments to obtain access to an MDU – a provision broader than the proposed narrowly-tailored rule – is constitutional. *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995). The court also noted that such a restriction "presumably advances the [government's] interest in preventing an unfair competitive market for cable television providers. Such an unfair market not only disadvantages competing cable providers, but disadvantages the MDU tenants in the form of cable service fees not regulated by the natural forces of competition." *Id.*